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No. 85-1663

# In the Supreme Court of the United States

OCTOBER TERM, 1985

ALVIN TOLLIVER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE UNITED STATES**

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## QUESTIONS PRESENTED

1. Whether petitioner was deprived of his Sixth Amendment right to a fair and impartial jury when the prosecutor used six of his eight peremptory challenges to strike black and Hispanic veniremen from the jury panel.

2. Whether there was probable cause to support petitioner's arrest.

3. Whether evidence seized from co-defendants and the automobile they were using could properly be weighed in determining the probable cause to arrest petitioner.

## TABLE OF CONTENTS


Page

Opinions below ..... 1

Jurisdiction ..... 1

Statement ..... 1

Argument ..... 4

Conclusion ..... 10


## TABLE OF AUTHORITIES

Cases:


*Alderman* v. *United States*, 394 U.S. 165 ..... 7

*Batson* v. *Kentucky*, No. 84-6263 (Apr. 30, 1986) ..... 5, 6

*Brown* v. *United States*, cert. granted, No. 85-5731 (June 2, 1986) ..... 5, 6, 10

*Combs* v. *United States*, 408 U.S. 224 ..... 8

*Illinois* v. *Andreas*, 463 U.S. 765 ..... 9

*New York* v. *Belton*, 453 U.S. 454 ..... 9

*Oliver* v. *United States*, 466 U.S. 170 ..... 9

*Rakas* v. *Illinois*, 439 U.S. 128 ..... 7, 8

*United States* v. *Campbell*, 766 F.2d 26 ..... 5-6

*United States* v. *Dall*, 608 F.2d 910, cert. denied, 445 U.S. 918 ..... 8-9

*United States* v. *Dyar*, 574 F.2d 1385, cert. denied, 439 U.S. 982 ..... 9

*United States* v. *Nunn*, 525 F.2d 958 ..... 9

Page

Cases—Continued:

*United States* v. *One 1977 Mercedes Benz*, 708 F.2d 444, cert. denied, 464 U.S. 1071 ..... 9

*United States* v. *Payner*, 447 U.S. 727 ..... 8

*United States* v. *Ross*, 456 U.S. 798 ..... 9

Constitution and statutes:

U.S. Const. :

Amend. IV ..... 7, 8, 9

Amend. V (Due Process Clause) ..... 5

Amend. VI ..... 4, 5

Amend. XIV (Equal Protection Clause) ..... 5

21 U.S.C. 841(a)(1) ..... 1

21 U.S.C. 846 ..... 2

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 780 F.2d 1177. The opinion of the court of appeals on petition for rehearing (Pet. App. 19a-24a) is reported at 785 F.2d 1034 (Table).

### JURISDICTION

The judgment of the court of appeals was entered on January 16, 1986. A petition for rehearing was denied on March 11, 1986. The petition for a writ of certiorari was filed on April 10, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner and four others were convicted of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and of

conspiracy to commit that offense, in violation of 21 U.S.C. 846. Petitioner was sentenced to consecutive 14-year terms on each count and to a ten-year special parole term on the substantive count. The court of appeals affirmed his convictions.[1]

The facts are summarized in the opinion of the court of appeals (Pet. App. 4a-8a). In 1982, DEA Agent Tom Waddill learned from reliable informants that petitioner was distributing large amounts of cocaine and heroin in Fort Worth, Texas. Donnie Harper, the owner of a club that petitioner managed, was petitioner's supervisor in the drug distribution operation (Pet. App. 4a). Agent Waddill learned from the FBI and from subpoenaed records that petitioner and Harper owned beeper phones, that people in the drug trade made regular calls to petitioner's beeper each night, and that Harper's beeper received numerous messages from petitioner's beeper (Pet. App. 5a). A number of arrested drug dealers also named petitioner as their source of narcotics (Hearing Tr. 19).

In September 1982, someone called "Juan" sent messages to petitioner's beeper from Mexico and from Brownsville, Texas (Hearing Tr. 20). The callback number on one message was a room at the Caravan Motel where co-defendant Jose Perrett was registered (Hearing Tr. 138-139). Perrett was involved in the sale of Mexican heroin and had identified himself as "Juan" when he had been arrested in May 1980 for heroin possession (Hearing Tr. 21-22, 27). From January 1983 until September 12, 1983, "Juan" made numerous calls to petitioner's beeper from Mexico, from

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[1]The court of appeals also affirmed the convictions of petitioner's co-defendants Jose Antonio Perrett and Amalio Galvan-Venegas (Pet. App. 18a). The court of appeals reversed the convictions of co-defendants Willie Ernest Scott and Angela Faye Onick, finding the evidence against them to be insufficient (Pet. App. 14a, 16a).

the Caravan Motel, and from other Fort Worth locations (Hearing Tr. 25).[2] When "Juan" called petitioner from a hotel, the room frequently was registered in the name of co-defendant Amalio Galvan (Pet. App. 5a).

On September 12, 1983, Agent Waddill learned that "Juan" had called petitioner, leaving a message with a call-back number at Room 109 of the Caravan Motel. The room, which was occupied by two individuals, was registered to co-defendant Galvan, and the motel registration form listed a license number of a car belonging to the wife of co-defendant Perrett (Pet. App. 5a-6a). Waddill and Fort Worth police officers established surveillance at the motel and saw Galvan leave Room 109 and drive away in a Chevrolet. Shortly thereafter, petitioner entered Room 109 carrying a bulging leather camera bag (Pet. App. 6a). Co-defendant Angela Onick then parked a Mercury automobile in front of Room 109, and shortly thereafter co-defendant Willie Scott entered the Mercury. Petitioner then left Room 109, put the leather bag in the car, and walked to the hotel restaurant with Onick. Onick returned to the Mercury and drove away with Scott, while petitioner went back to Room 109 (*ibid.*).

Waddill and the officers believed that they had witnessed a drug transaction, and they followed the Mercury to a drugstore. As Scott and Onick got out of the car, the officers approached and identified themselves. Waddill then retrieved the brown leather bag from the back seat of the car. The bag was empty, but Waddill discovered $849 in

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[2]On January 17, 1983, Agent Waddill and Fort Worth police officers conducted a surveillance at the Caravan Motel after "Juan" had called petitioner. They observed petitioner and defendant Galvan arrive in separate cars and enter a room of the motel. Galvan left the room, looked for something in his car, and then reentered the same room. Petitioner then left the room and drove away. Hearing Tr. 23-25.

cash and a small plastic baggie of white powder in a bulging change purse resting on the console between the two front seats. On the driver's seat, another officer discovered a clear gelatin capsule containing white powder, and a dark gummy substance inside cellophane wrapping. Onick and Scott were arrested. The officers then conducted a field test on those items they had found in the car; the dark gummy substance tested positive for opium derivatives, and the white powder in both the baggie and the capsule tested positive for cocaine (Pet. App. 6a-7a).

Galvan was later seen returning to Room 109. Within a few minutes, Galvan, Perrett, and petitioner left Room 109 and entered Galvan's Chevrolet. Waddill and the officers drew guns and ordered them out of the car (Pet. App. 7a). When the officers approached petitioner to pat him down for weapons, he reached towards his left ankle. Fearing that he had a weapon concealed in an ankle holster, two officers grabbed him, handcuffed him, and inspected the area around his left ankle. They found that petitioner was wearing two socks on his left foot and was carrying a dark gummy substance wrapped in plastic brown paper between the socks. The officers seized more than $38,000 in cash from Galvan and Perrett and arrested all three men (Pet. App. 7a-8a).

Laboratory tests established that the dark gummy substance in petitioner's socks and in the two vehicles was heroin. The heroin seized from petitioner had a potential street value of approximately $500,000 (Pet. App. 8a).

## ARGUMENT

1. Petitioner contends (Pet. 13-17) that the prosecution infringed his Sixth Amendment right to an impartial jury by using six of its eight peremptory challenges to exclude black and Hispanic veniremen. He argues that the case should be remanded to the district court for a hearing to determine if

the prosecutor's use of peremptory challenges against minority veniremen was based on factors unrelated to race and if race was a valid and justifiable consideration.

The court of appeals correctly rejected petitioner's contention (Pet. App. 9a-10a) under the law as it existed before *Batson* v. *Kentucky*, No. 84-6263 (Apr. 30, 1986). Therefore, petitioner's argument is without merit unless, in federal cases pending on direct appeal, the holding in *Batson* is given retroactive effect. That retroactivity issue is now before the Court in *Brown* v. *United States*, cert. granted, No. 85-5731 (June 2, 1986). Accordingly, it is appropriate to hold this petition pending a decision in *Brown*. If *Batson* is determined not to be retroactive, the petition should then be denied.

If *Batson* is determined to be retroactive, the petition should be granted, the judgment vacated, and the case remanded to the court of appeals for further consideration. On remand, however, it may not be necessary for the court of appeals to reach the issue of alleged discriminatory use of peremptory challenges. *Batson* was decided under the Equal Protection Clause of the Fourteenth Amendment, and the retroactivity question presented in *Brown* arises under the equal protection component of the Due Process Clause of the Fifth Amendment. Petitioner expressly relies on the Sixth Amendment rather than the Constitution's equal protection guarantees (Pet. 14). In addition, petitioner did not even make his Sixth Amendment objection at trial until after the court had seated the petit jury and alternates and excused all other members of the venire (1 Tr. 138-139). If there was any basis at all for a claim of improper use of peremptory challenges, then a timely objection—before the venire was dismissed—might have allowed the district court to cure any impropriety or allowed the government to reconsider one or more of its peremptory challenges. See *United States* v. *Campbell*, 766

F.2d 26 (1st Cir. 1985). Once the venire was dismissed, such actions were made more difficult, if not impossible. Accordingly there is a serious question whether petitioner's objection was timely. Therefore, if there is a remand, the court of appeals on remand must determine whether petitioner has adequately preserved a *Batson/ Brown* issue for review.

2. Petitioner also contends (Pet. 10-13) that his arrest was not supported by probable cause and that, accordingly, the evidence from the incidental search should be suppressed. Petitioner does not claim that the decision below conflicts with any decision of another court of appeals or of this Court, and this fact-bound issue does not warrant review.

Petitioner's statement that his arrest was based on "non-detailed, stale information" and "apparently innocent activity along with no information whatsoever that any transaction was to occur" (Pet. 13) does not comport with the record. Petitioner's long association with the narcotics trade in the Fort Worth area was revealed by reliable sources and surveillance, and corroborated by a beeper phone that received up to 45 messages a night, primarily from people in the drug trade. As the court of appeals put it, "several years of investigation had already established Tolliver's high profile in the illegal drug business in Fort Worth" (Pet. App. 18a). Perrett, a known heroin dealer who used the name "Juan," often called the beeper phone from a room at the Caravan Motel that was registered to Galvan. On the day of the arrest, Agent Waddill learned that "Juan" had called petitioner from Room 109 of the Caravan Motel, that the room was registered to Galvan, and that one of the occupants of the room was using a car owned by Perrett's wife. In addition, as the court of appeals observed (*ibid.*):

> Tolliver, Perrett, and Galvan were linked through Tolliver's [beeper phone] records, and Tolliver and Galvan had been observed meeting at the Caravan Motel on a prior occasion. On the day of the arrest, Tolliver was seen entering Room 109 of the motel with a bulging leather bag, which was found to be empty during Scott and Onick's arrest, leading to a reasonable suspicion that drugs or money it may have contained were still in Tolliver's possession or had been given to the remaining two suspects. The Mercury driven by Scott and Onick was registered to Barbara Carr, Tolliver's common law wife, and in it were found three items of contraband that field-tested positive for heroin or cocaine. Agent Waddill and the other officers could reasonably have believed that a narcotics transaction had [taken place] or was about to take place, and probable cause existed for the three defendants' arrest.

In these circumstances, the court of appeals properly found probable cause.

3. In a related argument, petitioner contends (Pet. 9-10) that the evidence seized from the automobile used by co-defendants Onick and Scott "may not be used to further buttress probable cause for [his] arrest." The court of appeals correctly determined that petitioner had no legitimate expectation of privacy in the automobile that would entitle him to raise this Fourth Amendment issue. See generally *Rakas* v. *Illinois*, 439 U.S. 128, 140 (1978).

It is settled that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted" (*Alderman* v. *United States*, 394 U.S. 165, 174 (1969)). A "defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than

that of a third party" (*United States* v. *Payner*, 447 U.S. 727, 731 (1980) (emphasis in original; citations omitted)). Petitioner had "the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure" (*Rakas*, 439 U.S. at 131 n.1).[3]

Petitioner relies on nothing more than the assertion that Barbara Carr, the registered owner of the automobile, was his common law wife.[4] Even if petitioner's relationship with Carr gave him some kind of ownership interest in the automobile, that interest alone did not give petitioner standing to challenge the search. "Ownership alone is not enough to establish a reasonable and legitimate expectation of privacy"; rather, "the total circumstances determine whether the one challenging the search has a reasonable and legitimate expectation of privacy in the locus of the search" (*United States* v. *Dall*, 608 F.2d 910, 914 (1st Cir. 1979),

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[3]Petitioner complains (Pet. 10) that "the government made no issue of standing in the trial court" and appears to suggest that the court of appeals therefore erred by reaching the issue. "Standing," however, is part of substantive Fourth Amendment analysis (*Rakas*, 439 U.S. at 140). Once the government controverted the suppression motion, the burden was on petitioner to show all elements of a Fourth Amendment violation, including the existence of a legitimate expectation of privacy. Notably, petitioner does not claim that there are pertinent facts that he would have shown in the trial court if he had been on notice that standing was in issue, as in *Combs* v. *United States*, 408 U.S. 224 (1972) (per curiam). Petitioner instead relies on a claim that the government "waived the issue of standing" (Pet. 10). Plainly, the government could not by silence "waive" an issue on which petitioner bore the burden of proof.

[4]Petitioner's claim that Carr was his common law wife is not supported by the record. Although the court of appeals referred to the automobile of petitioner's "common law wife" (Pet. App. 18a), the record only mentions that she was petitioner's "paramour" (4 Tr. 48; see Gov't Response to Defendant Tolliver's Petition for Rehearing 4).

cert. denied, 445 U.S. 918 (1980)).[5] In *Dall*, and in every other case that has considered the issue, the courts of appeals have held that something more than mere ownership of a vehicle must be shown to confer standing when the vehicle has been lent to someone else. *Ibid.*; *United States* v. *One 1977 Mercedes Benz*, 708 F.2d 444, 448-449 (9th Cir. 1983), cert. denied, 464 U.S. 1071 (1984); *United States* v. *Dyar*, 574 F.2d 1385, 1390-1391 (5th Cir.), cert. denied, 439 U.S. 982 (1978); *United States* v. *Nunn*, 525 F.2d 958, 959 (5th Cir. 1976). Petitioner did not show a legitimate expectation of privacy protected by the Fourth Amendment.[6]

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[5]In different contexts, this Court has made it clear that title to the object or area searched does not suffice to create a privacy interest under the Fourth Amendment. See, *e.g.*, *Oliver* v. *United States*, 466 U.S. 170, 183 (1984); *Illinois* v. *Andreas*, 463 U.S. 765, 771 (1983).

[6]In any event, the search did not violate the Fourth Amendment rights of anyone. The passenger compartment of an automobile may be searched incident to an arrest of its occupants. *New York* v. *Belton*, 453 U.S. 454 (1981). An automobile may also be searched without a warrant if officers have probable cause to believe it contains contraband under the automobile exception to the warrant requirement. *United States* v. *Ross*, 456 U.S. 798 (1982). Items of contraband that field-tested positive for heroin or cocaine were found on or near the front seat during the stop and arrest of the co-defendants, and those items could properly be viewed as seized incident to the co-defendants' arrests.

## CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Brown* v. *United States*, No. 85-5731.

Respectfully submitted.

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